

APPEAL NO. 030766
FILED MAY 8, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 10, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable "right foot/ankle" injury on _____; that the claimant had disability from March 27 through June 19, 2002; and that the appellant (carrier) had waived the right to dispute compensability by not timely contesting compensability in accordance with Sections 409.021 and 409.022.

The carrier appeals, contending that the claimant had not sustained any injury on _____; that her fractured ankle occurred on March 27, 2002; that because she did not have a compensable injury, she did not have disability; and that because she sustained no injury (physical harm or damage) on _____, under the doctrine in Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) an injury cannot be created by waiver. The claimant responds, urging affirmance.

DECISION

Affirmed.

It appears undisputed that the claimant, a flight attendant on a layover in London, fell from a chair while trying to adjust an air conditioning vent in her hotel room. The incident was witnessed by the hotel maintenance people and in evidence are statements from the hotel manager confirming the fall, and that a cold pack and cane were provided to the claimant for her sprained ankle. The carrier's position is that the claimant did not sustain any injury (as defined in Section 401.011(26)) whatsoever in that event. It further appears undisputed that the claimant needed some sort of assistance to go to the airport the next morning in either a wheelchair, electric cart, or "buggy"; that she was unable to work the flight back home; and that instead she "dead headed" on the flight back as a passenger. Also not disputed was that on the flight back to the U.S.A. on March 27, 2002, the claimant again fell while using the lavatory, either injuring or further injuring her right ankle. The carrier asserts that all of the claimant's injuries occurred in the lavatory event on March 27, 2002 (an injury regarding that event is not at issue). Eventually, the claimant was diagnosed with a fracture of the right fifth metatarsal bone and a ruptured lateral collateral ligament of the right ankle.

How much of the claimant's injury occurred in the hotel chair fall on _____, and how much occurred in the lavatory event on March 27, 2002, is in dispute. The claimant's transcribed statement probably most accurately describes the situation when she states "uh, the initial fall-I don't know, probable sprained because my ankle had swollen up really bad and then the lavatory may have done the break . . . I don't know the medical way of it." The hearing officer only found that the claimant sustained "physical harm or damage to her right foot/ankle on _____," without

trying to ascertain which event caused the fracture and which event caused the ruptured lateral collateral ligament. The hearing officer emphasized that the _____, injury “was a producing cause of [the claimant’s] disability.” (Emphasis in original.) Those determinations are certainly supported by the evidence and are not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

There is some dispute as to when the carrier received the first written notice of the _____, injury (a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) indicates first written notice of a (subsequent date of injury) on March 27, 2002). The claimant submitted evidence, and the hearing officer found, that the carrier received its first written notice of the _____, injury on May 29, 2002, and that the carrier filed a TWCC-21 disputing the compensability of that claim on June 12, 2002. Section 409.021 provides that an insurance carrier shall not later than the seventh day after the date on which the insurance carrier receives written notice of an injury, begin the payment of benefits or notify the Commission and the injured employee in writing of its refusal to pay. The Supreme Court of Texas in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) held that the failure of a carrier to comply with this provision resulted in the carrier waiving its right to contest compensability. The carrier basically defends this case on the basis that no injury whatsoever occurred in the _____, hotel incident and that all of the claimant’s injuries occurred the next day in the lavatory incident. The carrier seeks to apply the Williamson doctrine that an injury cannot be created by waiver. However, in this case the overwhelming evidence supports the hearing officer’s determination that some sort of injury was sustained on _____, whether it was a mild sprain or the fracture, and therefore Williamson is not applicable. See Texas Workers’ Compensation Commission Appeal No. 023158, decided January 28, 2003.

We have reviewed the complained-of determinations and conclude that there is sufficient legal and factual support for the hearing officer’s decision. Cain, *supra*.

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**TIM KELLY
AIG
675 BERING, 3RD FLOOR
HOUSTON, TEXAS 77507.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Margaret L. Turner
Appeals Judge